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No. 82-1845

In The
Supreme Court of the United States
October Term, 1983

THE STATE OF COLORADO,
Petitioner,

vs.

ANTONIO GUADALUPE NUNEZ,
Respondent.

PETITIONER'S RESPONSE TO MOTION TO DISMISS WRIT FOR WANT OF JURISDICTION

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ARGUMENT

THIS COURT HAS JURISDICTION TO HEAR THIS CASE.

In his Motion to Dismiss the Writ of Certiorari, which the petitioner received on November 9, 1983, the respondent relies upon a legal principle that does not apply to the case at bar. Citing Abney v. United States, 431 U.S. 651 (1977) and Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541 (1949), the respondent urges that this Court cannot consider the petitioner's claim. However, the cases and logic upon which the respondent depends concern decisions appealed pursuant to 28 U.S.C.A. Sec. 1291. The respondent's analysis does not affect petitions, like the one in this case, that are filed pursuant to 28 U.S.C.A. Sec. 1257(3).

In 28 U.S.C.A. Sec. 1291, Congress granted litigants the right to seek appellate review in federal Courts of appeals from final judgments entered by federal district courts. Before Cohen and Abney, the general rule was that a litigaht could not appeal a pretrial order because the statute did not provide for such review. However, those cases held that there were certain exceptions to the general rule, which this Court described as "collateral orders," that could be appealed before a trial.

The reasoning behind Cohen and Abney was clear. Since the statute in question did not provide for interlocutory appeals, this Court held that such appeals would not be allowed except in situations where pretrial review was crucial. However, if Congress established a statutory basis for a

pretrial appeal, then, of course, that legislative scheme would control. In federal criminal cases, Congress authorized interlocutory appeals in some carefully drafted circumstances in 18 U.S.C.A. Sec. 3731.

Based upon these precedents, the respondent's assertion that this Court has found that it will not review pretrial orders entered in state cases is mistaken. The cases upon which the respondent relies, including DiBella v. United States, 369 U.S. 121 (1962), predate the amendments to 18 U.S.C.A. Sec. 3731. DiBella involved the issue of whether the government could appeal a pretrial order in a criminal case. This Court held that there was not a statutory basis for that appeal. However, 18 U.S.C.A. Sec. 3731 now supplies that basis. DiBella did not determine the

question of whether this Court would review, by a writ of certiorari, a case in which an appellate court, pursuant to an existing statute, rendered a final order in a pretrial appeal. In at least one federal case, this Court has done just that. United States v. Helstoski, 442 U.S. 477 (1979); See also United States v. Ceccolini, 435 U.S. 268 (1978).

Once the legislature grants to the government the right to seek pretrial review of certain court orders, the policy that this Court explained in Cohen and Abney no longer applies. At that point, the legislature or court in question has decided that the flow of the trial process may be interrupted because important pretrial decisions that may effect a trial's outcome must be reviewed. If they may be examined as a matter of right by a direct appeal, then

this Court, if it feels that it is appropriate, may review the appellate opinion by a writ of certiorari. Since the state's interlocutory appeal will probably be the only opportunity that the government has to raise the issue in question before the designated appellate court, to suggest that this Court cannot analyze the appellate court's ruling would be to forever insulate that holding from this Court's scrutiny. If, as in the case at bar, that decision affects federal constitutional principles, such a result would subvert this Court's position as the final arbiter of the United States Constitution.

In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), this Court discussed the reasoning that does apply to this case. Unlike Cohen and Abney, Cox listed the situations in which state litigation

is final for this Court's review. Also, unlike Cohen and Abney, Cox concerned the statute that governs the petitioner's request for relief in this case: 28 U.S.C.A. Sec. 1257.

In Cox, the majority held that this Court would only examine state court decisions that are "final." Justice White described the kinds of decisions that are final at 477:

> [T]he Court has recurringly encountered situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state court to come. There are now at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. Sec. 1257...and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts. [Emphasis supplied].

Justice White then described those four categories, two of which apply to the case at bar. He wrote at 479 and 481:

> In the first category are those cases in which there are further proceedings - even entire trials - yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings is pre-ordained....
>
> In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the outcome of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claim for review. [Emphasis supplied].

The Colorado Supreme Court's decision is conclusive upon the federal issue presented by this case. Since that

order suppressed from use at trial the heroin taken from the respondent's pocket, which was the corpus delecti of the offense with which the respondent was charged, the result of any trial would be "preordained." Because the government could not establish the corpus delecti of the crime, the trial court would have to grant the respondent's motion for a judgment of acquittal.

If this case is returned to the trial court without this Court's review, the government will not later be able to obtain this Court's examination of the federal issue presented by the Colorado Supreme Court's opinion. As stated above, the prosecution cannot now present enough evidence to obtain a conviction. If the respondent is acquitted at trial, the government would be prevented from again appealing the issue presented by

this case. C.A.R. 4.1 (Appendix A); People v. Voss, 191 Colo. 338, 552 P.2d 1012 (1976). Even assuming, arguendo, that the prosecution could present enough evidence to a jury to convict the respondent, the government could not again appeal the question raised in this case. In fact, if the respondent were acquitted, this Court might find that any further appeal by the prosecution would be moot. In similar situations, this Court has held that it will review a state court's decision before all possible state proceedings have been held. California v. Stewart, 384 U.S. 436, 498 n. 71 (1966); South Dakota v. Neville, 74 L.Ed.2d 748, 755 n. 6 (1983); See also Fare v. Michael C., 439 U.S. 1310 (1978).

In Colorado, the prosecution may seek pretrial review of certain court

orders, involving constitutional issues, in order to resolve those questions before jeopardy attaches and the government can no longer try an accused. People v. Voss, supra; People v. Traubert, 199 Colo. 322, 608 P.2d 342 (1980). In the case at bar, C.A.R. 4.1, like 18 U.S.C.A. Sec. 3731, permits the state, as a matter of right, to obtain interlocutory review of some pretrial orders. As indicated in the Petition for a Writ of Certiorari at 1-2, the petitioner has taken every step in the Colorado courts to preserve this issue for this Court's review.

If this case is now remanded for trial, not only will the prosecution be unable to reappeal the issue presented here, but the respondent, as stated above, will be acquitted. Once he is acquitted, the double jeopardy doctrine

will prevent the state from retrying him, even if another appeal could be successfully brought before this Court. Therefore, the respondent's request that this Court dismiss the Writ is tantamount to a declaration that he has the right to be forever free from the charges brought against him before the petitioner may ask this Court to review the Colorado Supreme Court's decision. Not only is that position inconsistent with this Court's rulings, but it is inconsistent with justice. Therefore, this Court should deny the respondent's motion to dismiss the writ.

Respectfully submitted,

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Appendix A

C.A.R. 4.1(a)

(a) GROUNDS. The state may file an interlocutory appeal in the Supreme Court from a ruling of a district court granting a motion under Crim.P. 41(e) and (g) and Crim.P. 41.1(e) made in advance of trial by the defendant for return of property and to suppress evidence or granting a motion to suppress an extra-judicial confession or admission; provided that the state certifies to the judge who granted such motion and to the Supreme Court that the appeal is not taken for purposes of delay and the evidence is a substantial part of the proof of the charge pending against the defendant.

Appendix B

C.R.Cr.P. 41(e)

(e) MOTION FOR RETURN OF PROPERTY AND TO SUPPRESS EVIDENCE. A person aggrieved by an unlawful search and seizure may move the district court for the county where the property was seized for the return of property and to suppress for use as evidence anything so obtained on the ground that:

(1) The property was illegally seized without warrant; or

(2) The warrant is insufficient on its face; or

(3) The property seized is not that described in the warrant; or

(4) There was not probable cause for believing the existence of the

grounds on which the warrant was issued; or

(5) The warrant was illegally executed.

The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the court where the trial is to be had. The motion shall be made and heard before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court, in its discretion, may entertain the motion at the trial.